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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

LUKE RODRIGUEZ,

Defendant and Appellant.

C086353

(Super. Ct. No. 16FE007202)

Defendant Luke Rodriguez appeals his convictions for two counts of non-forcible lewd acts upon his niece, a child under the age of 14 years old. (Pen. Code, § 288, subd. (a).)<sup>1</sup> He contends the trial court prejudicially erred in allowing the victim's mother to testify that the victim's denial of the molestation was only as a result of being intimidated by her grandmother. We find no prejudicial error. Defendant also contends the prosecutor committed misconduct by asking the jurors to view the case through the

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

victim's eyes. Recognizing trial counsel did not object to this argument, defendant alternatively argues he received ineffective assistance of counsel. We affirm the judgment.

## **I. BACKGROUND<sup>2</sup>**

When the victim was five years old, defendant, her uncle, frequently babysat her. The victim and defendant got along well and played together. One day when they were watching cartoons in mother's bedroom, defendant touched her vagina under her clothes. She told him to stop. Another time, in the living room of her house, he touched her again in the same way while they were sitting on the couch.

About six to nine months before the victim told her mother about the molestation, mother noticed the victim started to appear uncomfortable around defendant. She seemed irritated by him and tried to avoid him. When mother told her he was going to babysit, the victim asked why grandmother could not watch her. Mother asked if defendant did anything bad to the victim, like hit her or touch her "privates," and the victim answered, "No."

One evening, when mother mentioned defendant, the victim made a face, a look of disgust. Mother asked the victim if there was anything the victim needed to tell her. The victim answered, "No." Mother asked again, and the victim answered, "Yes." Mother asked if anything bad had happened to the victim. The victim put her hands down her pants and said defendant touched her on her "private." Mother started crying and the victim comforted her. Mother asked the victim if defendant did other specific acts, including having the victim touch his penis or digitally penetrating her. The victim answered, "No."

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<sup>2</sup> To protect the privacy of the people involved in this case to the greatest extent possible, we will refer to the victim's mother as "mother," the victim's grandmother as "grandmother," and the victim's father as "father."

Mother called grandmother right away. Mother was very upset and could not maintain her composure. Grandmother wanted to speak with the victim, so mother called her into the room, and put the phone on speaker.

Mother testified grandmother told the victim to tell her what happened. The victim said, “ ‘Uncle touched my privates.’ ” Grandmother raised her voice and asked, “ ‘Are you sure? Are you sure?’ ” The victim answered, “ ‘I don’t know.’ ” The victim was nervous and scared while talking to grandmother. Mother testified the victim “got intimidated” by grandmother, so she interrupted the conversation and told grandmother to stop. The conversation with grandmother was the only time the victim denied the molestation.

Grandmother also testified about the phone call and had a different version. Grandmother said mother told her what defendant had done. Then, when mother put the victim on the phone, grandmother asked what happened, and the victim said, “ ‘Nothing, Grandma.’ ” Grandmother testified mother sounded upset and angry at the victim and told her to stop lying and tell the truth.

Mother then called father and they agreed they would contact law enforcement the next day. The next day, father asked the victim what had happened, and father recorded the conversation. The victim told father that defendant had touched her on her privates inside her pants. The victim also told the Child Protective Services emergency response social worker that she did not like being alone with defendant, because he would lay down and touch her in her “private area” when in the living room or in mother’s bedroom watching television. She told the social worker the touching made her uncomfortable and defendant had not done anything else to hurt her.

During a SAFE center interview, the victim stated defendant touched her privates while they were laying on mother’s bed watching television; it made her uncomfortable and she told him to stop. He was fully clothed and did not touch any other place on her body. The victim also stated defendant “pretty much did all the same thing” to her when

they were on the couch in the living room. She reported she had been afraid to tell mother because she thought she would get in trouble.

Two clinical psychologists testified as expert witnesses. Dr. Carmichael testified on child sexual abuse accommodation syndrome. He also testified about child suggestibility, and how victims of child abuse are particularly resistant to suggestive questions and are more likely to omit details than elaborate. Dr. O'Donohue testified about memories of child victims of sexual abuse, and in particular suggestibility and delayed false accusations. He testified that leading and repetitive questions can increase suggestibility and false memories. He explained suggested memories are vaguer than actual memories and are told inconsistently, and these memories are recanted more often.

Following trial, a jury found defendant guilty of two counts of lewd and lascivious acts on a child under the age of 14 (§ 288, subd. (a)), as alleged in the information. The trial court sentenced defendant to an aggregate term of eight years in prison.

## **II. DISCUSSION**

### **A. *Lay Opinion Testimony***

Defendant contends the trial court prejudicially erred in allowing mother to testify that when speaking to grandmother, the victim denied anything happened *because* she was intimidated by grandmother. He argues this testimony went to the victim's veracity and state of mind, suggesting the victim was telling the truth that she was molested by defendant. The People claim the trial court properly exercised its discretion because mother testified only as to her perception of the victim's conversation.

The erroneous admission of evidence requires reversal only if it was prejudicial. (*People v. Jandres* (2014) 226 Cal.App.4th 340, 357.) It is unnecessary for us to consider whether the trial court abused its discretion in admitting this testimony, because even assuming error, any error was harmless. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 131.) Contrary to defendant's claim that this error rises to the level of federal Constitutional error, improper admission of lay opinion evidence is a state law error reviewed under the

*Watson*<sup>3</sup> test; whether it is reasonably probable the defendant would have obtained a more favorable verdict if the improper evidence had not been admitted. (*DeHoyos, supra*, at p. 131.)

The victim, mother, and grandmother all testified before the jury. The jury was able to assess the credibility of each of these witnesses. The jury heard the recorded conversation between the victim and father the day after she reported the molestation. The jury heard the report of the molestation the victim gave to the emergency response social worker. And, the jury heard the recording of the SAFE interview. In each, the victim's story remained essentially consistent. She claimed defendant touched her privates while they were lying on mother's bed watching cartoons and when they were on the couch in the living room. She consistently denied he touched on any other part of her body, denied any penetration, or that she touched defendant's genitals. In addition, the jury heard testimony from two expert witnesses on the suggestibility of child abuse victims, delayed false accusations, and the impact of leading and repetitive questions of victims of child abuse. We find it is not reasonably probable defendant would have obtained a more favorable result had mother's statement that the victim denied the molestation because she was intimidated by grandmother been excluded.

*B. Prosecutorial Misconduct*

Defendant next contends the prosecutor improperly made an emotional plea to the jurors' self-interest and for them to view the case through the victim's perspective. He claims the issue is preserved despite a lack of objection as the error would so inflame the passions and prejudices of the jury that it was not curable by admonition. We disagree. Alternatively, defendant argues the failure to object constituted ineffective assistance of counsel. We are not persuaded.

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<sup>3</sup> *People v. Watson* (1956) 46 Cal.2d 818, 836.

# *1. Background*

In discussing the victim's testimony in closing argument, the prosecutor observed the subject matter of the testimony is embarrassing and uncomfortable. She argued:

"The moment I asked her, 'Did something happen to you that was not okay,' she was so embarrassed to say the word 'private.' She was so embarrassed because something really personal happened to her, something happened to her that she knew was embarrassing and should not have happened, and the person who did it to her was sitting 15 feet away.

"What we ask of our child victims is to come and talk about the most personal things, an adult could even talk about but you're a child.

"So think about this, ladies and gentleman, in evaluating [the victim's] testimony: Imagine in voir dire, when you were asked all these questions, I asked you, 'Think about your last sexual experience and then I'm going to pick on one person . . . and you're going to tell us about it. I'm going to ask you who it was with, where were you, what were you wearing, what was he or she wearing, what acts were committed, what body parts did you touch, what body parts did he or she touch, how did you feel during the acts, how did you feel after the acts?'

"I think everyone would be running out that door if I said I was going to now ask you those questions.

"Now imagine it was not a consensual act that I was asking about. Imagine you are a little five-year-old child and imagine the person who did this to you was a beloved uncle who you're now seeing for the first time, sitting in the same room and you're talking about this to a room full of absolute strangers.

"That is what we ask of our child victims. And [the victim] came up here, put on a brave face and she testified to things that happened two-and-a-half years ago."

In describing the conversation with grandmother in which the victim said nothing had happened, the prosecutor noted, mother had been a self-described "hot mess," crying

and cursing and exclaiming father would kill defendant. “[T]his [was] a heated, upsetting conversation for anyone, let alone a five[ ]year[ ]old. And then you have your grandma questioning you. It’s way easier to say, ‘Nothing happened, never mind,’ than to deal with this backlash that you’ve now caused.

“I think we can all think about a time in our lives where we said something that was true, it created a ripple effect that we did not expect and it was like, ‘Never mind, forget it, nothing happened, this is not worth this pain that I have now caused.’ ”

## 2. *Analysis*

“ ‘A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.’ [Citation.]” (*People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*).) Defendant acknowledges trial counsel did not object to the argument, and fails to demonstrate why these remarks were so inflammatory that an admonition would not have cured the harm. (*People v. Thompson* (2010) 49 Cal.4th 79, 121.) Accordingly, this claim is forfeited. (*Ibid.*)

Anticipating this result, defendant also contends trial counsel was ineffective for failing to object. To prevail, the record must show trial counsel acted below professional norms by not objecting, and there is a reasonable probability defendant would have obtained a better result had counsel objected. (*Lopez, supra*, 42 Cal.4th at p. 966.) We need not address the second prong, as we find counsel acted within professional norms.

“[O]rdinarily, ‘a prosecutor may not invite the jury to view the case through the victim’s eyes, because to do so appeals to the jury’s sympathy for the victim.’ ” (*Lopez, supra*, 42 Cal.4th at pp. 969-970.) It is also improper to appeal to the self-interest of jurors or to urge them to view the case from a personal point of view. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 696.) Such argument improperly invites jurors to exercise “subjective judgment rather than an impartial judgment predicated on the evidence” and

“it in effect asks each juror to become a personal partisan advocate . . . rather than an unbiased and unprejudiced weigher of the evidence.” (*Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 484, 485; see *People v. Vance* (2010) 188 Cal.App.4th 1182, 1194-1195 [prosecutor repeatedly argued over objections that the jury had to walk in a murder victim’s shoes and “literally relive in your mind’s eye and in your feelings” what the victim experienced]; *Vance, supra*, at p. 1193, fn. 8.)

Here, the prosecutor did not ask the jury to feel sympathy for the victim, view the crimes through her eyes, or appeal to the jury’s self-interest. Rather, the prosecutor argued that, in evaluating the victim’s testimony, the jury should consider her age, discomfort, embarrassment, and the familial relationships in explaining inconsistencies in her testimony, her hesitation in testifying, gaps in her recollections, and her denial to grandmother. By inviting the jurors to consider how difficult it would be for them, as adults, to discuss sexual experiences with each other, the prosecutor was arguing it would be even harder for the victim to openly discuss her experience in front of strangers and the perpetrator. This argument was tethered to the evidence and was a permissible argument regarding credibility. It was not an appeal to sympathy. Accordingly, counsel was not ineffective for failing to object to this argument.



### III. DISPOSITION

The judgment is affirmed.

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RENNER, J.

We concur:

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ROBIE, Acting P. J.

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DUARTE, J.